CITATION: Davis v. Wawanesa Mutual Insurance Company, 2015 ONSC 6624
COURT FILE NO.: 14-0883
DATE: 20151027

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
TERESA DAVIS, by her Litigation Guardian JAMES LUSH	)	T.H. Lehman and L. Fitzgerald-Husek, for the Plaintiff
Plaintiff	)	
– and –	)	K.E. Kolnhofer and D. Elshourfa, for the Defendant
WAWANESA MUTUAL INSURANCE COMPANY	)	
Defendant	)	
	)	**HEARD:** June 25 and October 7, 2015

REASONS FOR DECISION

QUINLAN J.:

Overview

[1] The plaintiff, Teresa Davis, by her Litigation Guardian, James Lush, seeks a determination before trial of the following question of law:

> Section 2 of Ontario Regulation 347/13, which came into force on February 1, 2014, provides that attendant care benefits payable in respect of attendant care services provided by a family member are to be capped at the amount of the economic loss sustained by that family member as a direct result of providing the attendant care.
>
> *Does this provision apply to the plaintiff's case, where the motor vehicle accident occurred before the provision came into force, and the claim for attendant care services provided by a family member was made after the provision came into force?*

Agreed Statement of Facts

[2] The plaintiff, born August 21, 1948, suffered injuries when she was involved in a motor vehicle accident on November 15, 2013. She was deemed to meet the criteria for catastrophic impairment pursuant to s. 3(2) of the *Statutory Accident Benefits Schedule* (SABS), a regulation under the *Insurance Act*, by virtue of her Glasgow Coma Scale score at the time of the accident.

[3] The plaintiff has been entitled to receive, and has received, statutory accident benefits pursuant to a policy of insurance held by the driver of the vehicle with Wawanesa Mutual Insurance Company (Wawanesa).

[4] An occupational therapist completed an Assessment of Attendant Care Needs (Form 1) on January 31, 2014, and concluded that the plaintiff would require 24-hour attendant care, payable at $7,790.15, upon her return home from the hospital. Wawanesa received the completed Form 1 on February 7, 2014. While the Form 1 amount is $7,790.15, the maximum benefit payable under the SABS is $6,000 per month.

[5] The plaintiff was discharged home from the hospital on February 6, 2014. After being discharged she began living with her son, James Lush, and her daughter-in-law, Hilary Lush. The plaintiff chose to have attendant care provided by family members rather than professional service providers. The plaintiff is claiming attendant care benefits only with respect to the attendant care provided by Ms. Lush, who took a leave of absence from her job as a financial analyst beginning March 10, 2014, to provide attendant care to the plaintiff.

[6] Ontario Regulation 347/13 came into force on February 1, 2014, including the following provision:

> 2. Subsection 19(3) of the [Statutory Accident Benefits] Regulation is amended by adding the following paragraph:
>
> 4. Despite paragraphs 1, 2 and 3, if a person who provided attendant care services (the "attendant care provider") to or for the insured person did not do so in the course of the employment, occupation or profession in which the attendant care provider would ordinarily have been engaged for remuneration, but for the accident, the amount of the attendant care benefit payable in respect of that attendant care shall not exceed the amount of the economic loss sustained by the attendant care provider during the period while, and as a direct result of, providing the attendant care.

[7] Regulation 347/13 is silent on the issue of whether it applies to claims arising from accidents before February 1, 2014.

[8] On February 21, 2014, Wawanesa wrote to the plaintiff to notify her it had received the Form 1 on February 7, 2014. Wawanesa approved the plaintiff's claim for attendant care benefits and noted that her monthly assessed attendant care benefit was $7,790.15, but the maximum available under the SABS is $6,000 per month. Wawanesa advised that a family member or friend providing attendant care to the plaintiff would be paid at a rate equal to their sustained economic loss (lost wages), or Wawanesa would continue to pay a professional service provider to a maximum of $6,000 per month.

[9] Ms. Lush did not provide attendant care services in the course of the employment, occupation or profession in which she would ordinarily have been engaged for remuneration but for the accident. The plaintiff has continued to claim for attendant care provided by Ms. Lush, and Wawanesa has been paying Ms. Lush her lost wages of $2,030.58 biweekly ($4,061.16 monthly), which she had been receiving at her 35-hour per week job. Wawanesa has agreed to pay the balance of the attendant care benefit up to the $6,000 statutory cap to a professional service provider (i.e. a PSW) in the event the plaintiff retains one to provide respite attendant care services.

[10] The plaintiff, through her counsel, has taken the position that Regulation 347/13 does not apply to claims arising from accidents that occurred before February 1, 2014, and that Wawanesa should be paying $6,000 per month for attendant care provided by Ms. Lush.

Positions of the Parties

[11] The parties agree that an accident benefits claim crystallizes or vests on the date of the accident.

[12] The plaintiff's position is that the change made by Regulation 347/13 is a major change to the law relating to accident benefits that interferes with vested rights: it restricts the attendant care benefit in a way that makes it very difficult for the most seriously injured people to pay for 24-hour care. As such, it interferes with substantive rights and should only be applied prospectively. The Regulation is silent on the issue of whether it applies to claims arising from accidents before its enactment; the presumption against retrospectivity has not been rebutted by clear, legislative intent and therefore, the law that applies is the law in force at the time of the plaintiff's accident.

[13] The defendant's position is that Regulation 347/13 did not alter the criteria for entitlement to attendant care benefits; rather, it clarified the formula for calculating the quantum of the benefit to be paid once entitlement has been established. The amendment flows from earlier amendments made in 2010, and clarifies that once the entitlement criteria is met, the benefit payable is to be capped at the amount of the actual economic loss. Accordingly, this is a procedural or declaratory amendment that is to be applied retrospectively. If the court finds that the amendment is substantive, the intention of the amendment was to clarify a provision that resulted in ongoing mischief and, as such, any presumption against retrospectivity is rebutted. To find otherwise would undermine the intent of the legislature and would place an unfair burden on rate-payers across Ontario.

Legislative and Jurisprudential Background

[14] Under the first Statutory Accident Benefits Schedule enacted by the Government of Ontario, *Statutory Accident Benefits Schedule – Accidents before January 1, 1994*, R.R.O. 1990, O. Reg. 672, insurers were not required to pay for attendant care provided by family members who did not lose income as a result of providing care. By virtue of the next Statutory Accident Benefits Schedule enacted by the government, *Statutory Accident Benefits Schedule – Accidents After December 31, 1993 And Before November 1, 1996*, O. Reg. 776/93, family members of the insured person who provided attendant care were compensated without proof of loss of income. The *Statutory Accidents Benefits Schedule – Accidents on or after November 1, 1996*, O. Reg. 403/96, continued this treatment of care-giving by family members (*Henry v. Gore Mutual Insurance Co.*, 2013 ONCA 480, 116 O.R. (3d) 701, at paras. 27-28).

[15] On March 31, 2009, the Financial Services Commission of Ontario (FSCO) released its first five-year report on Automobile Insurance in Ontario. The report "included recommendations aimed at improving the effectiveness and administration of the automobile insurance system" (*Henry*, at para. 29). The report referred to concerns raised by the Insurance Bureau of Canada (IBC) that the attendant care benefit was being over-utilized. The *Statutory Accident Benefits Schedule – Effective September 1, 2010*, Ont. Reg. 34/10 (SABS–2010), was enacted following the release of FSCO's report. Among other things, it required that the family care-giver have sustained an economic loss as a result of providing the attendant care services to the insured.

[16] SABS–2010 set new criteria for when an attendant care expense would be considered "incurred" and thus eligible for coverage. Section 3(7)(e) of SABS–2010 provided:

> For the purposes of this Regulation, …
>
> (e) … an expense in respect of goods or services referred to in this Regulation is not incurred by an insured person unless,
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> (i) the insured person has received the goods or services to which the expense relates,
>
> (ii) the insured person has paid the expense, has promised to pay the expense or is otherwise legally obligated to pay the expense, and
>
> (iii) the person who provided the goods or services,
>
> (A) did so in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged, but for the accident, or

(B) sustained an economic loss as a result of providing the goods or services to the insured person

[17] "Economic loss" was not defined in SABS–2010.

[18] At the time of the 2010 amendments, the Ministry of Finance published statements referring to SABS-2010 as an initiative taken by the government to, among other things, address opportunistic fraud caused by the padding of originally legitimate claims ("Cracking Down on Auto Insurance Fraud: McGuinty Government Helps Lower Costs for Ontario Drivers" *Ministry of Finance* (6 February 2013), online: <http://www.fin.gov.on.ca >).

[19] On July 16, 2013, the Court of Appeal released its decision in *Henry v. Gore*. The Court of Appeal held, at para. 22:

> [U]nder SABS-2010, economic loss serves as a threshold for entitlement to (and not as a measure or factor in quantifying the amount of) reasonable and necessary attendant care benefits to be paid by an insurer. I conclude this based on the language used, the scheme and logic of SABS-2010, and the fact that the legislature could have, but did not, include a provision in SABS-2010 for calculating the amount payable where a family care-giver sustains an economic loss as a result of providing required care to an insured. Moreover, this interpretation is not inconsistent with the evolution of the regulations governing payment for attendant care provided by family members or the five-year report on automobile insurance in Ontario released by the Financial Services Commission of Ontario ("FSCO") shortly before SABS-2010 came into force.

[20] The Court of Appeal determined that if a family member sustains an economic loss as a result of providing care (as detailed in the Form 1 assessment), attendant care benefits are payable with respect to all care detailed in the Form 1 provided by the family member (subject to the maximums and various other safeguards). To the extent that the economic loss sustained by the family member as a result of providing such care to an insured exceeds the maximum attendant care benefits stipulated in SABS-2010, the family member is not indemnified. The Court of Appeal found that "the requirement adopted (that the family care-giver have sustained an economic loss) provides a rough check on attendant care costs" (*Henry*, at para. 35).

[21] On December 17, 2013, the Government of Ontario filed Regulation 347/13 with the Regulatory Registry of the Ministry of Finance ("Amendments to the Statutory Accident Benefits Schedule (Ontario Regulation 34/10)" *Regulatory Registry*, online: Service Ontario http://www.ontariocanada.com [*Regulation Amendment Approval*]). Regulation 347/13 came into force on February 1, 2014. It provides that if the insured person elects to receive attendant care services from a non-professional service provider, then the rate

paid for those services will be capped at the actual economic loss incurred by the care-giver as a result of providing attendant care services. The maximum attendant care benefit payable remains at $6,000 per month for insured persons who meet the eligibility criteria. If the economic loss of the attendant care provider is less than the monthly amount the insured person is entitled to receive according to the Form 1 and/or the $6,000 monthly cap, the difference can be applied towards additional or respite care from a professional service provider, in addition to the care provided by the family member. If no such loss is sustained, no attendant care benefits are payable.

[22] A Bulletin from the Ministry of Finance dated December 19, 2013, referred to the introduction of:

> …[N]ew initiatives to reduce costs and uncertainty in the auto insurance system.…The government is also unveiling a new package of regulatory changes that will…[e]nsure that those who attend to an injured family member or friend after an accident will be compensated for the actual economic loss they incur during that time ("Reducing Auto Insurance Rates for Ontario Drivers" *Ministry of Finance* (19 December 2013), online: <http://news.ontario.ca/ >).

It also stated that the changes will clarify benefits for claimants with a minor injury.

[23] The approved regulations page for the February 2014 amendments also includes a statement from the Ministry of Finance that the amendments will:

> [H]elp reduce costs and uncertainty in the system by continuing to crack down on abuse and fraud, and clarifying benefits for auto insurance claimants.…The amendments…limit attendant care benefits to actual economic loss…and clarify that an election for…benefits is final… (*Regulation Amendment Approval*).

Temporal Interpretation of Legislation

[24] The Supreme Court in *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, identified a number of rules of interpretation that can be helpful in determining whether legislation is to have prospective or retrospective effect:

(i) Cases in which legislation has retrospective effect must be exceptional;

(ii) Where legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable;

(iii) New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively;

(iv) New procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights and is presumed to apply immediately to both pending and future cases;

(v) The key task in determining the issue lies not in labelling the provisions "procedural" or "substantive", but in discerning whether they affect substantive rights; and

(vi) The fact that new legislation has an effect on the content or existence of a right is an indication that substantive rights are affected.

[25] The author of *Sullivan on the Construction of Statutes* identified the following additional rules:

(i) Procedural law may be defined as law that governs the methods by which facts are proven and legal consequences are established in any type of proceedings;

(ii) To be considered procedural in the circumstances of a case, a provision must be exclusively procedural; that is, its application to the facts in question must not interfere with any substantive rights or liabilities of the parties or produce any unjust results; and

(iii) It is presumed that the legislature does not intend to confer a power on subordinate authorities to make regulations or orders that are retroactive, retrospective or interfere with vested rights (R. Sullivan, *Sullivan on the Construction of Statutes* (Toronto: Lexis Nexis, 2014), at pp.804-805 and 698).

Does Regulation 347/13 Change or Clarify the Law?

[26] Under SABS–2010, a family member needs to prove an economic loss as a result of providing care to obtain the full amount of the Form 1 entitlement. The Court of Appeal found that under SABS-2010, economic loss serves as a threshold for entitlement to attendant care benefits. Regulation 347/13 limits entitlement to the actual economic loss sustained by the non-professional service provider (family member). The Regulation sets out the manner in which the amount of the economic loss is quantified. The Regulation does not simply declare the state of an earlier, uncertain law, make SABS–2010 clearer, or correct defects in SABS–2010 such that the presumption against retrospectivity would not apply (*Westminster City Council v. Haywood*, [2000] All E.R. 634, [2000] I.C.R. 827 (Chancery Division), at para. 19; *Apotex Inc. v. Merck & Co.*, 2011 FCA 329, 425 N.R. 279, at paras. 47-50, leave to appeal to SCC refused, 436 N.R. 382, [2012] S.C.C.A. No. 29). I find that the Regulation changes the law.

[27] Although explanatory notes are admissible for the purpose of determining the intent of the legislators (*Westminster*), here, the Bulletin accompanying the Regulation speaks of clarification of benefits for minor injury claimants and of a "change" to ensure persons

are compensated for actual economic loss incurred by a family member. The statements in the Bulletin speak of "new initiatives" and "new changes". The statement accompanying the Regulation speaks of "limit[ing] attendant care benefits". These support that the legislators considered that the law was being changed, not clarified.

Regulation 347/13 Changes the Law; Does it Interfere With Substantive Rights?

[28] At the time of her accident, the Court of Appeal had interpreted SABS–2010 such that, "If an economic loss is sustained, attendant care benefits are payable with respect to all care detailed in the Form 1 provided by the family member…" (emphasis added) (subject to maximums and other safeguards) (*Henry*, at paras 33-36). SABS–2010 did not limit and, according to the Court of Appeal in *Henry*, did not intend to limit attendant care benefits to the actual loss incurred.

[29] Regulation 347/13 limits the benefit payable to a family member to the amount of economic loss sustained by the family member. It affects the right of the claimant to the full amount of attendant care benefits as detailed in the Form 1 upon proof of an economic loss incurred regardless of the amount of their actual economic loss. It affects the content of the right to attendant care benefits. The requirement that attendant care benefits be restricted to the quantum of the economic loss sustained has a substantive impact on an insured's right to attendant care benefits, whether that requirement is considered to be procedural or not (*Rajbhai v. State Farm Mutual Automobile Insurance Co.*, 2014 CarswellOnt 16322 (F.S.C.O) at para. 18). As such, the Regulation interferes with substantive rights (*J. (R.) v. Dominion of Canada General Insurance Co.*, 2013CarswellOnt 13685 (F.S.C.O.) at para. 65).

[30] If attendant care benefits are to be treated in the manner in which benefits bestowed by legislation, such as employment insurance benefits (EI) and disability support benefits (ODSP) are treated, case law supports that the claimant has no vested right that the rules will remain fixed, but has a right to the benefit as it exists from to time (*Canada (Att. Gen.) v. Kowalchuk*, 114 N.R. 275 (F.C.A.) at para. 8; *Bigras v. Ontario (Director, Disability Support Program)*, [2008] O.J. No. 4099 (Div. Ct.) at para. 12). However, attendant care benefits and other benefits regulated by the SABS are unlike benefits bestowed by legislation, such as EI or ODSP. The legislation that establishes the SABS makes this clear. Section 2 (1) of SABS–2010 states:

> "Except as otherwise provided in section 68, the benefits set out in this Regulation shall be provided under every contract evidenced by a motor vehicle liability policy in respect of accidents occurring on or after September 1, 2010" (O. Reg. 34/10). [Emphasis added.]

The legislation mandates that all contracts of insurance contain certain rights. These rights are not statutory in nature merely by virtue of being regulated. Rather, they are contractual rights that must be provided in every contract for automobile insurance in the province. This interpretation of the rights arising under the SABS is supported by the

Appeal Decision in *Federico v. State Farm Mutual Automobile Insurance Co.*, 2013 CarswellOnt 6347 (F.S.C.O.), application for judicial review refused, 2014 ONSC 109, 2014 CarswellOnt 286. In his conclusion at para. 65, Lawrence Blackman Dir. Delegate found that the respondent had, as of the date of the accident, "tangible, concrete, vested and materialized rights to interest at 2% per month, compounded monthly," for benefits he was receiving under the SABS, and that this right was "not simply a potential public law right, but a crystalized private contractual right."

[31] Therefore, I accept the plaintiff's position that attendant care benefits are a contractual right to which an injured person is entitled. The contract of insurance between an insured and insurer creates rights and obligations, including the right to attendant care benefits. As such, despite the fact that SABS are a government-legislated scheme, the treatment of other benefits bestowed by legislation and cases dealing with those benefits do not assist in deciding the issue before me.

[32] The quantification of the interest rate under SABS has been repeatedly held to be a matter of substantive law (*Sidhu v. State Farm Mutual Automobile Insurance Co.*, 2014 ONCA 920, 43 C.C.L.I. (5th) 22, at paras. 9-10). This supports the proposition and my finding that the quantification of attendant care benefits should be similarly characterized.

Regulation 347/13 Interferes with Substantive Rights; Is the Presumption Against Retrospective Rebutted?

[33] A clear, legislative intent is required to rebut the presumption against retrospectivity. Wawanesa argues that this intent is shown by the timeliness of the Regulation (within months of the *Henry* decision), its remedial nature and the explanatory notes that accompanied its filing.

[34] The fact that legislation is remedial does not necessarily mean that it is intended to apply retrospectively (*R. v. Evans*, 2015 BCCA 46, 321 C.C.C. (3d) 130 at para. 33). As the Court of Appeal held at para. 60 of *R. v. Bengy*, 2015 ONCA 397, 325 C.C.C. (3d) 22, if the need for immediate reform of the law were so pressing, why would the legislature not have explicitly made the law retrospective? There is nothing in the record, including the explanatory notes, that demonstrates a clear legislative intent that the amendment is to apply retrospectively.

[35] Accordingly, the presumption has not been rebutted and therefore applies. I find that the plaintiff has a vested right to payment of the attendant care benefit to which she was entitled on the date of her accident.

Conclusion

[36] For the foregoing reasons, the question before the Court is answered as follows: Section 2 of Ontario Regulation 347/13 does not apply to this case.

Costs

[37] The parties have agreed on the amount to which the successful party is entitled. Accordingly, Wawanesa shall pay the plaintiff her costs in the amount of $20,000 inclusive of disbursements and HST within thirty days.

QUINLAN J.

Released: October 27, 2015